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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1972

No. A-275

~~72-5~~492

WILLIAM ALFRED GLASS,

Petitioner,

against

STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

WILLIAM CAHN
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PETITION NOT PRINTED

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BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To:

The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States

The petitioner, William Alfred Glass, prays that a writ of certiorari shall issue to review a judgment of the New York State Court of Appeals entered on June 1, 1972.

Opinion Below

No opinion was rendered by the New York State Court of Appeals in the course of affirming unanimously an order of the Appellate Division of the Supreme Court of the State of New York, Second Department. No opinion was rendered by the Appellate Division in affirming the order of the Nassau County Court of the Hon. Frank X. Altimari, County Court Judge, dated July 22, 1970. An opinion, People's Exhibit A, was written by Judge Altimari.

Jurisdiction

The jurisdiction of this Court is apparently sought pursuant to 28 U.S.C. § 1257, subd. 3, it being argued that petitioner's plea was involuntary.

Questions Presented

Petitioner was originally indicted on May 15, 1956, for Robbery Second Degree and Grand Larceny First Degree growing out of the holdup of a woman cashier in a movie theatre in Freeport, County of Nassau, on January 4, 1954 (Indictment No. 14,064).

On the same date, May 15, 1956, petitioner was also indicted for Kidnapping, Sodomy First and Second Degree, Assault Second Degree, and the Felonious Possession of a Knife growing out of the abduction on April 18, 1956, at knifepoint of a 14 year old boy who was then sodomized (Indictment No. 14,065).

A week later, on March 22, 1956, petitioner was indicted for a third time for actually kidnapping a 13 year old boy and driving the victim to an isolated area in Suffolk County where at knifepoint he committed acts of sodomy, after which he threw the victim in the trunk of the car very nearly killing the lad (Nassau County Indictment No. 14,081).

Eugene Flanagan, Esq. was assigned to represent the petitioner and on June 11, 1956, appellant pled guilty to Robbery Second Degree and two counts of Kidnapping. On June 29, 1956, petitioner was sentenced to 20 years to life on each kidnapping conviction, with the direction that the sentences be served concurrently. Seven and one-half to 15 years was imposed for the Robbery Second Degree conviction with the provision that it be served consecutively with the 20 years to life judgment. Petitioner was a multiple felony offender. There was no appeal from these judgments of conviction.

On June 15, 1970, a hearing was held in the trial court and on June 24, 1970, petitioner was resentenced nunc pro tunc to permit an appeal from the resettled judgment of conviction. The validity of the judgment of resentence was reviewed and upheld by the Appellate Division and the New York State Court of Appeals. It is not directly challenged or called up for review by this petition for a writ of certiorari. Thereafter, petitioner motioned the trial court to vacate the judgment of conviction contending *Boykin* v. *Alabama* ([1969] 395 U.S. 238) was retroactive. It was argued the test or standard laid down in *Boykin* when applied to the plea required that the sentence be set aside, the guilty plea be overturned, and the case be restored to the trial calendar.

The People contend *Boykin* v. *Alabama (supra)* is not retroactive. Moreover, the action of the trial judge and the District Attorney at the time of the plea taking does not run afoul of the spirit of the *Boykin* case. It is to these points that the brief shall be directed.

Constitutional Provisions Involved

United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previous ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

The Writ Should Be Disallowed

The petitioner contends the judgment or resentence should be overturned, the guilty plea set aside, and the case returned for trial because the court records making up the judgment roll or record on appeal do not prove clearly and convincingly that petitioner's plea was voluntary. Moreover, it is argued the guilty plea is also bad because it does not clearly appear from the court's records that when appellant pled guilty, he knew he would be sentenced to 20 years to life. The predicate for the argument is a 1969 United States Supreme Court case, *Boykin* v. *Alabama* (395 U.S. 238) which petitioner insists over-

turns the rationale of *Nixon, Fooks, Lang, Robinson, Todizia* and *Salone* (21 N.Y. 2d 338).

Apparently the stenographer's minutes of the guilty plea and sentence were not transcribed and filed with the County Clerk because a notice of appeal was not served. This procedure was consistent with the practice in the Nassau County Court and elsewhere throughout the state at the time.

Subsequently petitioner ordered copies of the minutes of the plea and sentence from the stenographer and they have been submitted as part of the Appendix, if not the judgment roll.

An examination of the petition does not reveal a single item of evidence proving or tending to establish that the plea was involuntary or entered in ignorance of the sentence. Instead, it is charged the plea must be vacated because the record does not affirmatively prove that appellant knew he would be sentenced to 20 years to life.

If the case was controlled by today's law, which it is not (see, *e.g., People* v. *De Renezzio* [1966] 19 N.Y. 2d 45; *People ex rel. Cadogan* v. *McMann* [1969] 24 N.Y. 2d 233; *McCarthy* v. *United States* [1969] 394 U.S. 459; *Halliday* v. *United States* [1969] 394 U.S. 831), the argument might oblige the Court to re-examine the New York rule. It is clear the petition must be determined by the law controlling at the time of the trial, or appeal had there been one in the normal course of things (*supra*).

Petitioner does not really dispute these basics. Rather, he contends the case is unique because the appeal from the judgment was reinstated via *Montgomery* (24 N.Y. 2d 130). The argument is the rights of the parties shall be determined today by today's rules of law and not those of the 50's because the case comes to the court by way of an appeal and not habeas corpus (*People ex rel. Cadogan* v. *McMann, supra*).

The *style* of the proceeding is not controlling. Be it habeas corpus or a delayed appeal, the issues will be tested by the controlling principles of law as they were at the time of the trial and appeal, had there been one (*People* v. *De Renezzio, supra*).

George De Renezzio was convicted in 1938 of felony murder in connection with the shooting of a New York City police sergeant during the course of a robbery of a pawn shop in the Bronx. After a jury trial, De Renezzio received a life sentence. A timely notice of appeal was served and filed to the Appellate Division. The appeal was never perfected and ultimately was dismissed in keeping with the regular procedure. Ultimately the appeal was reinstated and, it was argued that the trial was unfair and the judgment of conviction must be reversed because the police authorities procured a statement of admission from De Renezzio after indictment, and in the absence of counsel.

In the early 60's the New York Court of Appeals concluded that once the criminal court proceedings had commenced against an accused, he could not be interviewed in the absence of counsel and any statement of admission or confession procured under these circumstances was, as a matter of law, a violation of his right to counsel as set forth in the New York State Constitution (*People* v. *Waterman*, 9 N.Y. 2d 561; *People* v. *Di Biasi*, 7 N.Y. 2d 544).

Admittedly no such rule prevailed at the time of the trial or at the time of the original appeal had it been perfected. In behalf of De Renezzio, it was argued that because the case was in the Court of Appeals on a direct appeal from the judgment of conviction, though delayed and reinstated, today's rules of law controlled. The Court concluded the case was not in the "normal appellate process" so today's rules of law did not apply.

There really is no material difference between this petitioner and De Renezzio. Admittedly when petitioner

was convicted, the trial judge was under no legal obligation to reveal the sentence to the accused before the guilty plea.

Moreover, if the appeal had been perfected in the normal course of things, there was no rule of law in the Appellate Division of the Court of Appeals to the contrary. This case is not here in the "normal appellate process" so today's rules do not apply (*People* v. *De Renezzio, supra; cf. People ex rel. Cadogan* v. *McMann, supra*).

As a matter of fact, there is no principle or rule of law today in the Court of Appeals, or the United States Supreme Court that would overturn a voluntary guilty plea because the sentence was not agreed upon between the accused and the trial judge beforehand. New York has established a leadership position countrywide guaranteeing to every accused that his plea be voluntary (*People* v. *Howard* [1962] 12 N.Y. 2d 65; Fuld, J. "The Writ of Error Coram Nobis" N.Y.L.J., June 5, 1947, p. 2212, col. 1; June 6, 1947, p. 2230, col. 1; June 7, 1947, p. 2248, cols. 1, 2). The *Boykin* case decides no more.

Edward Boykin, a 27 year old negro, went on a crime spree in the Spring of 1966 in Mobile, Alabama, committing 5 armed robberies within a few days. Counsel was assigned and 3 days later, Boykin pled guilty to Armed Robbery. After a jury hearing, Boykin was sentenced to death.

Judge Douglas concluded *on the facts* there was insufficient evidence in the record proving Boykin's guilty plea was *voluntary*.

The majority did not overturn the guilty plea because the Judge failed to warn Boykin that armed robbery was punishable by death if the jury saw fit. It was the judgment of the majority that the record failed to prove the plea was voluntary.

Rule 11 of the Federal Rules provides as follows:

> "A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with an understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

The Supreme Court decided the Federal Judges must comply literally with Rule 11 (*McCarthy* v. *United States* [1969] 394 U.S. 459), but they also refused to run the *McCarthy* requirements backwards (*Halliday* v. *United States* [1969] 394 U.S. 831), because the rule did not relate to the "fact finding process."

Elsewhere, the courts apparently without a single exception have refused to apply *Boykin* retroactively (*United States ex rel. Rogers* v. *Adams* [2d Cir. 1970] 435 F. 2d 1372; *United States ex rel. Hughes* v. *Rundle* [3d Cir. 1969] 419 F. 2d 116; *United States ex rel. Smith* v. *Cox* [4th Cir. 1970] 435 F. 2d 453; *United States ex rel. Dominguez* v. *Henderson* [5th Cir. 1971] 447 F. 2d 207; *United States ex rel. Meller* v. *Missouri* [8th Cir. 1970] 431 F. 2d 120; *United States ex rel. Moss* v. *Craven* [9th Cir. 1970] 427 F. 2d 139; *United States ex rel. Perry* v. *Crouse* [10th Cir. 1970] 429 F. 2d 1083).

The rule in the state courts is the same (*Com.* v. *Godfrey* [1969] 434 Pa. 532, 254 A. 2d 923; *People* v. *Williams* [1970] 44 Ill. 2d 334, 255 N.E. 2d 385; *In Re Tahl* [1969] 1 Cal. 3d 122, 460 P. 2d 449).

This partial list suggests New York was not out of step when it refused to apply the *Boykin* doctrine to a 1956 case.

Finally, we are convinced the *Boykin* rules state nothing really new as far as New York is concerned (see, *e.g.*, *Matter of Lyons* v. *Goldstein* [1943] 290 N.Y. 19; *People* v. *Howard* [1962] 12 N.Y. 2d 65). At least since 1943, an involuntary guilty plea could be overturned by appeal if there was a record, and coram nobis is not (*supra*).

Particularly where the accused is facing death or, as here, life imprisonment, the duty of the court is grave indeed. Judge Douglas concluded this type of case "demands the utmost solicitude of which the courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and its consequences. When the Judge discharges that function, he leaves a record adequate for any review that may be later sought * * * and forestalls the spin-off of collateral proceedings that seek to probe murky memories" (*Boykin* v. *Alabama*, *supra*, p. 244).

Unless "the record convincingly demonstrates the falsity" of the allegations in the petition (*People* v. *Guarigilia* [1951] 303 N.Y. 338, p. 342), every New York defendant for at least 20 years has been entitled to a hearing when the facts alleged in the coram nobis petition, if true, warranted a vacatur of the judgment of conviction (*People* v. *Guarigilia*, *supra*; *People* v. *Richetti* [1951] 302 N.Y. 290; *cf. People* v. *White* [1956] 309 N.Y. 636).

More than 20 years ago, the Court said (*People* v. *Guarigilia*, *supra*, p. 343):

> "It is only when the record conclusively demonstrates the falsity of the allegations and there is no reasonable probability at all that defendant's averments are true that a hearing will be denied."

If the defect in the plea taking is apparent on the face of the record, the remedy is an appeal (*Matter of Lyons* v. *Goldstein* [1943] 290 N.Y. 19; *People* v. *Howard* [1962] 12 N.Y. 2d 65). If the record is silent, the review is by way of coram nobis (*supra*).

If the facts in the petition even if true would not require an overturning of the guilty plea, a hearing is unnecessary whether there is a record or not (*McMann* v. *Richardson* [1970] 397 U.S. 759; *People* v. *Griffin* [1965] 16 N.Y. 2d 508; *People* v. *Dash* [1965] 16 N.Y. 2d 493; *People* v. *Rogers* [1965] 15 N.Y. 2d 690; *People* v. *Nicholson* [1962] 11 N.Y. 2d 1067).

The judgment of the New York Court over 20 years ago that records must be kept particularly in a court of general jurisdiction when the defendant is arraigned, pleads guilty, and is sentenced, is the essence of the coram nobis doctrine announced over the past two decades. It is undisputed petitioner was not arraigned in secret and did not plead guilty off stage.

There are court records clearly recording the event including stenographer's minutes of the change of plea and sentence.

Absent a notice of appeal, the stenographer did not transcribe the proceedings or file them with the Clerk of the Court. This practice was in keeping with the settled New York procedure. Counsel for appellant in his Appendix includes the minutes of the guilty plea and sentence procured by appellant personally from the stenographer in a related proceeding. The minutes are included with the petition. An examination of the testimony reveals that Mr. Robinson was the District Attorney and Mr. Flanagan the defendant's lawyer. The crux of the plea was as follows (A 10-11):

> "Mr. Robinson: May I suggest to the Court that you inquire of the defendant on the record now whether or not he understands what he has done so there will be no question about it afterwards.
>
> The Court: You have pleaded guilty to three indictments as recited by the Clerk and you will be sentenced accordingly, whatever the appropriate sentence is for all three of those convictions. You now stand convicted.

The Defendant: Yes.

The Court: As charged in the first count of each one of those indictments? Does he know what the first count is?

The Clerk: I read them to him, sir.

The Court: You thoroughly understand?

The Defendant: Yes.

Mr. Flanagan: Your Honor, we went over it completely several times in the jail and I discussed it several times with the defendant and completely understands the procedure.

Mr. Robinson: The only purpose of my request to the Court is because I want to make it understood from the defendant's mouth on the record that he understands that he has pleaded guilty to two counts of kidnapping and one of robbery second degree.

The Court: You see, you pleaded guilty to three very serious crimes and you also should tell us that you haven't been made any promises as to what the sentence would be for these serious crimes.

The Defendant: No, sir.

The Court: It is your own free act?

The Defendant: Yes, sir, it is.

The Court: All right."

It is apparent that the Judge, the District Attorney and the defense lawyer were guilty of no overreaching or wrongdoing in relation to the plea.

On June 15, 1970, a hearing was held in the Nassau County Court before Judge Altimari to explore appellant's right to appeal. At the conclusion of the hearing, appellant was resentenced to permit an appeal.

During the hearing, appellant testified as follows (13-14):

"Q. Mr. Glass, did you plead guilty to the first count of the indictment voluntarily? A. I would say no.

Mr. Sordi: Objection.
The Court: The answer is no.

Q. Will you please tell the Court why you pled guilty to the first count of each indictment?

Mr. Sordi: Your Honor, I think we are going far afield. This doesn't have any relevance to the question in issue here.
The Court: Well, it goes to the question as to whether or not even if he knew he had a right to appeal, would he have appealed. I think that is what counsel is driving at.
Mr. Della Ratta: Yes.
The Court: I will allow it.

A. Because my confessions forced me into pleading guilty. I couldn't win no trial.
Q. In other words, did you plead on advice of Mr. Flanagan? A. No, sir.
Q. Well, you pled because of your confession that you had given to the police officer? A. Yes."

Petitioner has by his sworn testimony brushed aside whatever mystery might have remained regarding the plea. In clear, unequivocal terms, he testified:

"My confessions forced me into pleading guilty. I couldn't win no trial."

It is respectfully submitted neither the Court of Appeals or the United States Supreme Court has ever overturned a judgment of conviction where the stenographer's minutes of the proceeding including the sworn testimony of the defendant established that the guilty plea was negotiated and accepted by the accused because of his confession rather than some wrongdoing on the part of the Judge or the District Attorney (*McMann* v. *Richardson* [1970] 397 U.S. 759; *People* v. *Griffin* [1965] 16 N.Y. 2d 508; *People* v. *Dash* [1965] 16 N.Y. 2d 493; *People* v. *Rogers* [1965]

15 N.Y. 2d 690; *People* v. *Nicholson* [1962] 11 N.Y. 2d 1067).

The bulk, if not the whole, of petitioner's retroactivity arguments have been thoroughly considered and rejected both in New York (*People ex rel. Cadogan* v. *McMann* [1969] 24 N.Y. 2d 233; *People* v. *Kaiser* [1967] 21 N.Y. 2d 86, aff'd 394 U.S. 280; *People* v. *De Renezzio* [1966] 19 N.Y. 2d 45; *People* v. *McQueen* [1966] 18 N.Y. 2d 337) and the Supreme Court (*Kaiser* v. *New York* [1969] 394 U.S. 280; *Desist* v. *United States* [1969] 394 U.S. 244; *Johnson* v. *New Jersey* [1966] 384 U.S. 719).

There are no compelling reasons for granting the writ because the New York State Court of Appeals did not decide a federal constitutional question heretofore undetermined by this Court. Moreover, the Court of Appeals has not decided this case in a way probably not in accordance with any prior controlling decision of this Court.

CONCLUSION

The petition should be disallowed.

Respectfully submitted,

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